IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	NO. 06-700
	:	
JEFFREY RIGGINS	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J., **August 27, 2007**

Jeffrey Riggins asks me to grant him a *Franks*[1] hearing to evaluate the veracity of a drug enforcement agent's affidavit used to substantiate Riggins's arrest warrant. The Government argues Riggins fails the *Franks* test because he can neither prove one of the two challenged statements are false, nor that the officer's misstatements were intentional or reckless. Even without the erroneous statements, the Government argues the warrant demonstrated probable cause. Riggins also seeks to preclude expert testimony on (1) whether he possessed drugs with the intent to distribute, and (2) whether the drugs contained cocaine base ("crack"). The Government asserts controlling case law compels me to admit the anticipated drug expert testimony. I agree with the Government on both arguments and conclude Riggins is not entitled to a *Franks* hearing and the expert testimony is admitted.

FINDINGS OF FACTS

Law enforcement suspected Riggins of buying large quantities of cocaine from a drug organization operating in Lehigh Valley, Pennsylvania. A joint Drug Enforcement Agency - FBI investigation ensued with a court order wiretapping Riggins's phone. Riggins's conversations

[1] *Franks v. Delaware*, 438 U.S. 154 (1978).

showed at least two dozen separate cocaine purchases from August 2006 to December 2006, with most of the purchases involving 50 grams of cocaine. DEA Task Force Officer Jeffrey Taylor, the lead investigator, testified Riggins discussed cooking crack cocaine and selling a firearm to his drug suppliers. Surveillance agents observed Riggins traveling to meet his suppliers and returning to 700 Walnut Street, Easton, Pennsylvania after these alleged purchases.

A search of 700 Walnut Street pursuant to a warrant produced a large quantity of plastic "baggies," an electronic scale, and a loaded gun which discharged when Riggins threw it out the window of the apartment. After the search, law enforcement sought an arrest warrant substantiated by an affidavit from Officer Taylor identifying Riggins as a high-volume customer of the Lehigh Valley drug organization. Taylor's affidavit was based on the 18-month long investigation, which included wiretaps, physical surveillance, and an informant. Riggins challenges paragraph eight of the arrest warrant in which Taylor described the events of October 21, 2006 based on (1) a couple of Riggins's phone conversations where Riggins ordered and commented on the effect of cooking the cocaine and (2) surveillance of Riggins driving to and from the transaction. Taylor also stated the wiretapped conversation included Riggins's instructions to his supplier to save 60 grams of the cocaine for him. Magistrate Judge Arnold C. Rapaport evaluated the affidavit's statements and found probable cause to show (1) on or about October 21, 2006, Riggins possessed with intent to distribute a mixture and substance containing a detectable amount of cocaine base (crack)[2]; (2) on

[2] The challenged statement regarding October 21, 2006 reads as follows:

> [A]t approximately 4:15 p.m., pursuant to a court-ordered wiretap, a phone call was intercepted during which Jeffrey Riggins told the other individual referenced in paragraph 7 that he Riggins had a very high yield of crack cocaine when he cooked the cocaine previously purchased from the other individual. Riggins then asked the other individual to save another 60 grams from the same batch of the high quantity cocaine for Riggins to purchase later. The other individual agreed.

or about November 25, 2006, Riggins possessed with intent to distribute crack[3]; and (3) on or about December 5, 2006, Riggins possessed a firearm in furtherance of a drug trafficking crime.

On November 8, 2006, additional intercepted phone calls show Riggins made arrangements to sell a firearm to his supplier. Riggins met his supplier at a restaurant, where agents observed them engage in conversation for approximately fifteen minutes. Paragraph 10 of Riggins's arrest warrant stated he had a recorded conversation on November 25, 2006. In actuality, there was no conversation on November 25, 2006, and the Government admits the date was incorrect. There were drug transactions that took place on November 24, 26, and 27, of 2006.

DISCUSSION

Riggins asserts he is entitled to a *Franks* hearing because his arrest warrant was based on Officer Taylor's false statements, which he made with malice or reckless disregard for the truth. The Government contends the only misstatement was Officer Taylor's inadvertent error of identifying

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Def.'s Mot. for *Franks* Hearing Ex. A (Riggins's arrest warrant ¶ 8).

[3] The challenged statement regarding November 25, 2006 reads as follows:

> [O]n November 25, 2006, pursuant to a court-ordered wiretap, a series of short conversations between Riggins and the same individual referenced in paragraph 7 during which Riggins negotiated to purchase 20 grams of cocaine from the other individual. Surveillance agents subsequently observed Riggins arrive at the store owned by the other individual located at 901 Ferry Street, Easton. Riggins was traveling in a Chrysler bearing New Jersey registration SYG98A. Riggins entering the basement door of 901 Ferry Street, Easton. After approximately four minutes, surveillance agents observed Riggins exit the basement , enter the Chrysler and depart the area. Approximately seven minutes later, surveillance agents observed Riggins park the Chrysler on South Seventh Street just adjacent to 700 Walnut Street, and enter via the front door.

Def.'s Mot. for *Franks* Hearing Ex. A (Riggins's arrest warrant ¶ 10).

November 25 instead of November 26, 2006 as the date of Riggins's conversation. Alternatively, the Government argues the arrest warrant still has probable cause without Officer Taylor's misstatement. I agree with the Government and conclude Riggins is not entitled to a *Franks* hearing.

The presence of an error in an arrest warrant does not immediately void the warrant. *United States v. Carter*, 756 F.2d 310, 313 (3d Cir. 1985) (validating a warrant despite an incorrect date because the error did not negate any elements of the offense). Riggins is entitled to a hearing challenging the veracity of a statement in the warrant affidavit only if he can make a "substantial preliminary showing" (1) an affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement in the warrant affidavit; and (2) the allegedly false statement was necessary to the finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978). The *Franks* rule is intended to deter law enforcement personnel from recklessly including false information in affidavits of probable cause. *United States v. Yusuf*, 461 F.3d 374, 389 (3d Cir. 2006). While *Franks* dealt with search warrants, later cases held the rule applies to arrest warrants as well. *See, e.g., United States v. Carter*, 756 F.2d 310, 313 (3d Cir. 1985); *United States v. Harrison*, 400 F. Supp. 2d 780, 785 (E.D. Pa. 2005).

To prove an affiant made the false statement knowingly and intentionally or with reckless disregard of the truth, Riggins must identify which portions of the affidavit he claims are false, provide supporting reasons, and include evidence of falsity. *Franks*, 438 U.S. at 171 (holding granting of evidentiary hearing requires more than a conclusory attack and "must be supported by more than a mere desire to cross-examine"). Claims of "negligence or innocent mistake" cannot prove reckless disregard for the truth, and every element of an affidavit need not be objectively truthful so long as the affiant reasonably believed the information to be true. *Franks*, 436 U.S. at

165-71. Reckless disregard exists when "viewing all the evidence, the affiant must have entertained serious doubts as to the truth of his statements or had obvious reasons to doubt the accuracy of the information he reported." *Wilson v. Russo*, 212 F.3d 781, 787 (3d Cir. 2000) (internal quotations and citations omitted). A preliminary showing of intentional or reckless falsity requires allegations of the officer's state of mind. *Yusuf*, 461 F.3d at 383.

Riggins identifies two errors in the affidavit, but only provides proof for one of the accusations.[4] I will only consider Riggins's challenge to Taylor's description of alleged drug-related conversations and transaction on November 25, 2006.

The Government admits no phone calls took place on November 25, 2006. Riggins baselessly alleges Taylor made the mistake "knowingly and intentionally and with reckless disregard for the truth." The Government explains Taylor, who had investigated and observed high volume of drug trafficking by Riggins, merely confused the date.

The Government supports its explanation with ample evidence including transcripts from November 24, 26, and 27, and a summary of the intercepted calls from August 30, 2006 to December 4, 2006 wherein Riggins repeatedly arranges to meet his alleged supplier. Although Riggins had a conversation with his supplier on November 26, that conversation did not mention the quantity of

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[4] Riggins challenges Officer Taylor's interpretation of the October 21, 2006 discussion as a drug distribution conversation. I conclude Taylor's description is based on a reasonable interpretation of a series of phone calls between Riggins and his supplier on that date. In a transcript of the conversation three hours after the alleged drug transaction for 28 grams of cocaine, Riggins asks his supplier, "You want to know how much I got out of that?" When his supplier answers in the affirmative, Riggins replied, "Fourty-four grams…. Twenty-eight. Fourty-four…" Moreover, during the later conversation, Riggins described the product as "mucho bueno" and instructed his supplier to "put away sixty for me." Based on this information and the context of the extensive Riggins investigation, I conclude it reasonable to interpret Riggins's conversations as relating to drugs.

drugs involved. While this is evidence of a false statement, Riggins failed to provide any evidence of Officer Taylor's reckless disregard or of Officer Taylor's state of mind. *Yusuf*, 461 F.3d at 383. I conclude because Taylor did not misstate the date with malice or reckless disregard of the truth, Riggins has failed to meet his burden on the first *Franks* prong.

Even if I excise the October 21, 2006 conversation (paragraph eight) and Taylor's misstatement of November 25 (paragraph 10), Riggins must show the challenged statements were necessary in determining probable cause. *Franks*, 438 U.S. at 155. Because the arrest warrant includes the drug paraphernalia and guns seized from the unchallenged search warrant and unchallenged November 8 conversation, neither paragraph eight nor paragraph 10 are necessary to find probable cause. I conclude Riggins fails the second *Franks* prong.

Probable cause to arrest exists when the facts are sufficient to justify a reasonable belief an offense has been or is being committed. *Harrison*, 400 F. Supp. 2d at 788-89 (citing *United States v. Cruz*, 910 F.2d 1072, 1076 (3d Cir.1990)). The existence of probable cause to arrest should be determined based on the totality of the circumstances. *United States v. Reid*, 185 Fed. Appx. 208, 210 (3d Cir. 2006) (finding probable cause to arrest when defendant threw down his gun and fled from police). To issue an arrest warrant, the judicial officer must receive "sufficient information to support an independent judgment that probable cause exists for the warrant." *Whiteley v. Warden*, 401 U.S. 560, 564 (1971) (holding a sheriff's affidavit merely concluding the defendant had committed the charged crime to be insufficient). When determining probable cause, both the Magistrate Judge and this Court are limited to the affidavit's facts. *United States v. Hodge*, 246 F.3d 301, 305 (3d Cir. 2001). *Franks* requires courts to omit the affirmative misstatements and determine whether the remaining information in the affidavit supports a finding of probable cause. *Franks*, 438

U.S. at 155.

Riggins challenges only his arrest warrant, not the search warrant. Thus, the large quantity of plastic "baggies," the electronic scale, and the gun law enforcement found during the search of Riggins's home were properly included in the arrest warrant.

Riggins also does not challenge Taylor's statements regarding the events of November 8, 2006. These statements are based on a conversation where Riggins clearly asked his supplier to purchase a gun from him. I conclude it is reasonable, given the history of phone calls between the two men, to interpret the conversation as an attempt by Riggins to trade the gun for drugs. The Government's surveillance records show a subsequent meeting between the men. All of these factors substantiate Magistrate Judge Rapaport's finding of probable cause. The results of the search warrant and the intercepted communication of November 8 creates a reasonable belief an offense had been committed based on the totality of the circumstances. I conclude Riggins is not entitled to a *Franks* hearing because he has failed to show how the arrest warrant lacked probable cause without Officer Taylor's misstatement or the October 21, 2006 transaction.

Riggins also seeks to exclude testimony by any government experts on (1) whether Riggins possessed drugs with the intent to distribute and (2) whether the drugs contained crack. Riggins argues the testimony should not be admitted because: (1) the experts would not assist the jury in understanding evidence as Fed. R. Evid. 702 requires; (2) it fails to meet the *Daubert*[5] and *Kumho Tire*[6] reliability standards; (3) the testimony would be prohibited evidence regarding Riggins's

[5] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (holding both reliable foundation and relevancy must substantiate expert's testimony).

[6] *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999) (affirming district court's use of *Daubert* factors when deciding admission of tire analyst's testimony).

mental state; and (4) it would be unduly prejudicial under Fed. R. Evid. 403. The Government asserts Third Circuit precedent admits testimony from a drug expert such as FBI Special Agent Clifford Fiedler about drug trafficking and facts consistent with Riggins's case as long as he does not testify to Riggins's state of mind. I agree with the Government and will deny Riggins's motion *in limine* to exclude drug expert testimony.

The Third Circuit has specifically allowed this type of drug expert testimony limiting the extent to which an expert can testify regarding a defendant's mental state. Expert testimony regarding drug activity has been admitted and held helpful to the jury. *United States v. Watson*, 260 F.3d 301, 307-08 (3d Cir. 2001) (allowing testimony on the coded language of drug dealers). Further, the Third Circuit explicitly has held the "modus operandi of drug trafficking" is an appropriate field for expert opinion. *United State v. Perez*, 280 F.3d 318, 341-42 (3d Cir. 2002) (upholding testimony about drug trafficking practices and methods).

Most recently, in *United States v. Davis*, a police officer with 12 years of experience in the narcotics division was allowed to testify as an expert about the methods of operation for drug dealers in the area. 397 F.3d 173 (3d Cir. 2005) (en banc) (remanded for re-sentencing on *Booker* grounds). The *Davis* court reasoned the officer's testimony was not within the common knowledge of the average juror and the officer did not impermissibly state his opinion as to the mental state of the defendants. *Id.*

Riggins attempts, unsuccessfully, to distinguish this case on grounds the facts here are not obscure or complex. This argument is meritless because the Third Circuit has not required complex facts for the admittance of drug expert testimony. *See Davis*, 397 F.3d at 177 (veteran police officer allowed to provide expert testimony as to a hypothetical defendant found with forty-four packets of

cocaine base in his pocket)*; see also Watson*, 260 F.3d at 305-06 (court admitted expert testimony when defendant was found on bus with 100 plastic baggies, a marijuana cigarette, and a crumpled paper filled with crack cocaine); *Perez* 280 F.3d at 324-25 (admitting expert testimony when defendant and co-conspirators traveled abroad and domestically in order to transport and distribute drugs).

In summary, Riggins has not met his burden to show he is entitled to a *Franks* hearing. He has failed to make a substantial preliminary showing Taylor misstated paragraph eight, the October 21, 2006 conversation, and paragraph 10, the November 25, 2006 conversation, intentionally or with reckless disregard for the truth. Even after excising these two paragraphs, the arrest warrant included sufficient probable cause through the drug paraphernalia seized from the unchallenged search warrant and the November 8, 2006 drug distribution conversation. Riggins has additionally failed to distinguish his case from controlling Third Circuit precedent which compels me to admit drug expert testimony as long as it excludes testimony of Riggins's state of mind. Accordingly, I hereby enter the following order:

ORDER

And now this 23rd day of August, 2007, Defendant's Motion for *Franks* Hearing (Document 13) and Motion *in limine* to exclude drug expert testimony (Document 17) are DENIED.

BY THE COURT:

\s\ Juan R. Sánchez
Juan R. Sánchez J.